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Supreme Court of the United States

OCTOBER TERM, 1961.

No. 465.

ELIZABETH N. GRAHAM, individually and doing business as MAINE CHANCE FARM,

Petitioner,

against

FANNIE K. HERTZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 465.

ELIZABETH N. GRAHAM, individually and doing business as MAINE CHANCE FARM,

Petitioner,

against

FANNIE K. HERTZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

This common law negligence action is a federal action solely because of diversity of citizenship. Petitioner seeks review of a unanimous opinion of the Court of Appeals affirming the general and special verdicts of the jury below, which was the second jury to find that petitioner's negligence caused the collision in question.

Opinion Below.

The opinion of the Court of Appeals is officially reported at 292 F. 2d 443.

Jurisdiction.

Respondent believes that the jurisdictional statement contained in the petition (p. 2) is defective. The petition was filed with this Court on October 2, 1961. It refers to the "opinion" of the Court of Appeals, but fails to mention that judgment was entered in that court on July 3, 1961. Since the petition was filed after the entry of judgment by the Court of Appeals, the petition cannot be treated as one to review a case before judgment. See 28 U. S. C. §2101(e), printed *infra* at p. A-1. Respondent submits that once judgment is entered below, a petition for certiorari must be addressed to that judgment. See *Robertson & Kirkham*, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, §412 (1951), discussing the denial of certiorari in *Portland General Electric Co.* v. *United States*, 323 U. S. 761 (1944).

Statement of the Case.

On October 17, 1954, respondent's horse was struck and killed by petitioner's riderless runaway horse on the training track at Belmont Park, Elmont, New York (120a-124a, 168a).* Both horses were killed in the collision (176a), and Wesley Brite, respondent's exercise boy who was riding her horse at the time, was injured (20a). Two actions were brought in the Southern District of New York against petitioner, one for the value of respondent's horse, and the other for injuries sustained by Wesley Brite.

With the exception that Brite's claims were for personal injuries and respondent's claims for property damage, the amended complaint in the *Brite* action is substan-

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* Unless otherwise noted, such numbers refer to pages of Appendix to Appellant's Brief in the Court of Appeals.

tially identical to the complaint in this action (88a). With the exception that petitioner interposed a counterclaim in this action for the loss and destruction of her horse, her amended answer to Brite's amended complaint is substantially identical to the answer in this action (88a). The *Brite* action was tried first, and Brite recovered a jury verdict against petitioner in the amount of $80,000, judgment therefor being entered on May 7, 1957 (88a).

After the *Brite* judgment became final (88a), respondent moved in this action for leave to file a supplemental reply alleging that petitioner's counterclaim was barred by the *Brite* judgment because the matters alleged in the counterclaim had become *res judicata*. Respondent also moved for summary judgment on this defense (16a-21a). By order entered February 13, 1958, the District Court (Kaufman, D. J.) granted respondent leave to file a supplemental reply raising the *res judicata* defense, but denied the motion for summary judgment thereon (81a-82a).

Before this action was assigned to any district judge for trial, respondent served notice upon petitioner that upon such assignment, respondent would apply for a prior separate trial without jury of the issues raised by the supplemental reply (Appendix, *infra* p. A-3). The case was assigned to Honorable Richard H. Levet, D. J., for trial, and at the first pretrial conference in his chambers on April 6, 1960, respondent served and filed her motion for such separate trial (84a-90a). On April 12, 1960 the merits of this motion were argued before Judge Levet in chambers. On April 21, 1960 respondent's motion was granted (92a) and the separate trial was thereupon held in open court without jury (92a-95a). At the conclusion of this separate trial, petitioner's counterclaim was dismissed on the merits (95a).

Thereafter, the other issues in this action were tried before Judge Levet and a jury from April 25 through April 28, 1960 (2a). On April 28, the jury rendered special verdicts in favor of respondent and a general verdict in the sum of $23,700 (102a). The next day, Judge Levet's opinion dismissing petitioner's counterclaim was filed. On May 9, 1960, judgment was entered in the District Court (2a), dismissing petitioner's counterclaim on the merits and awarding respondent the sum of $23,700, together with interest on that sum from the date of loss in the amount of $7,892.10 (105a).

On May 25, 1960, petitioner filed a notice of appeal to the Court of Appeals (2a). The merits of petitioner's appeal were argued before the Second Circuit on January 13, 1961. On March 2, 1961, while petitioner's appeal was *sub judice*, the New York Court of Appeals filed its opinion in *Purcell* v. *Long Island Daily Press Pub. Co.*, 9 N. Y. 2d 255, 173 N. E. 2d 865 (1961). The *Purcell* decision held that under New York law a plaintiff is not entitled as a matter of right to interest on a jury verdict for damages to property through negligence. Prior to the *Purcell* decision, the Second Circuit in *Newburgh Land & Dock Co.* v. *Texas Co.*, 227 F. 2d 732 (2nd Cir. 1955) and the District Court (Levet, D. J.) in *White* v. *Zutell*, 161 F. Supp. 567 (S. D. N. Y. 1958), *aff'd*, 263 F. 2d 613 (2nd Cir. 1959) had interpreted New York law to allow such interest as a matter of right.

The opinion of the Court of Appeals in this action was filed on July 3, 1961 and its judgment was entered the same day (Appendix, *infra* p. A-1). That judgment affirmed the judgment of the District Court in so far as it awarded respondent the sum of $23,700 on the general verdict of the jury, vacated the judgment of the District Court in so far as it awarded respondent interest on the verdict from the

date of loss, and remanded this case to the District Court for trial by a jury of the sole question whether respondent should receive interest on the previous verdict.

On July 20, 1961, judgment was entered in the District Court in accordance with the judgment of the Court of Appeals. This case is presently on the jury calendar of the District Court awaiting trial of the issue remanded and bearing Calendar No. 93.

Reasons for Denying the Writ.

The remand of the interest issue raises no conflic with state law, no constitutional problem and no other qu stion of importance to anyone other than the litigants. Peti tioner's other three "Questions Presented" simply raise the same erroneous factual arguments and unfounde procedural objections previously rejected by a unan nous Court of Appeals. The petition thus presents no iss for review by this Court.

POINT I.

The remand below raises no conflict with ate law, no constitutional question, and no other issu for review by this Court.

The petition claims that the remand to the D rict Court for trial by a jury of the sole question wh her respondent should receive interest on the previous v lict is "directly in conflict with the decision of" the New ork Court of Appeals in *Purcell* v. *Long Island Daily Pres ub. Co.*, 9 N. Y. 2d 255, 173 N. E. 2d 865 (1961). The urt there decided only that its dictum in *Flamm* v. *Nobl* 296

N. Y. 262, 72 N. E. 2d 886 (1947) had not changed the New York rule that a plaintiff is not entitled as a matter of right to interest on a jury verdict for damages to property through negligence.

Purcell made it clear that interest on such a verdict must be awarded by a jury. The opinion, however, says nothing one way or the other about a new trial by a second jury on the question of interest. *Purcell* does not hold that a new trial "could not be obtained" in New York, as petitioner suggests. Thus the Second Circuit's handling of the interest question scarcely presents a direct conflict worthy of review by this Court. See *Robertson & Kirkham*, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, §333 (1951).

Further, it is difficult to see how the remand raises any important public question in view of the unique circumstances of its exercise. The Second Circuit, while recognizing that neither party requested submission of the interest question to the jury below, exercised its discretion to rectify a situation which resulted directly from its apparent misinterpretation of New York law in *Newburgh Land & Dock Co.* v. *Texas Co.*, 227 F. 2d 732 (2nd Cir. 1955) which was followed by Judge Levet in *White* v. *Zutell*, 161 F. Supp. 567 (S. D. N. Y. 1958), *aff'd*, 263 F. 2d 613 (2nd Cir. 1959) and in this case.

The Second Circuit explained:

> "[W]e do not think that the plaintiff [respondent] should suffer by reliance upon our earlier interpretions of New York law in being deprived of the chance of a discretionary award of interest by the jury." (292 F. 2d at 449)

The remand was clearly confined to the facts of this case, and there is no showing in the petition that it would

affect any other litigants. Indeed, it is not clear that the remand will have any substantive effect on petitioner because the trial of the issue remanded has not been held and that part of the judgment is not final.

Petitioner's second complaint about the remand is that another jury cannot consider the question of interest on the sum already awarded as damages without violating petitioner's constitutional right to trial by jury. This is said to be so, because the two issues are supposedly too interwoven to be tried separately without confusion and uncertainty.

The question of interest, however, is not at all related to the question of value already decided by the jury below. Judge Levet charged the jury that, as to any award of damages, they were to consider only "the market value of the plaintiff's horse at the time and the place of the loss, that is, October 17, 1954" (356a).

Under New York law the question of interest on a verdict for damages to property is a question of full or complete indemnity, bearing no relation to liability, culpability or the value of the property involved. See *Purcell* v. *Long Island Daily Press Pub. Co.*, 9 N. Y. 2d 255, 173 N. E. 2d 865 (1961); *Flamm* v. *Noble*, 296 N. Y. 262, 72 N. E. 2d 886 (1947). Full or complete indemnity involves nothing more than the loss of use of the horse or the loss of use of the money it would have brought had it been sold. The jury was not instructed even to consider these factors in determining the market value of the horse at the time it was destroyed. Nor would a second jury have to redetermine the market value of the horse to decide whether interest from the date of loss is necessary for full or complete indemnity. Thus, the remand raises no constitutional question. See *Gasoline Prods. Co.* v. *Champlin Refining Co.*, 283 U. S. 494, 498 (1931).

Finally, the remand does not conflict with the decisions in *Hosie* v. *Chicago & North Western R. Co.*, 282 F. 2d 639 (7th Cir. 1960), *cert. denied*, 365 U. S. 814 (1961) and *United Air Lines, Inc.* v. *Wiener*, 286 F. 2d 302 (9th Cir.), *cert. denied*, 366 U. S. 924 (1961), as petitioner suggests. In *Hosie*, the Seventh Circuit expressly declined to pass on the question whether a constitutional issue is raised when some issues are submitted to one jury and other issues to another jury. *Wiener* simply decided that because exemplary damages were there sought, the degree of culpability was necessarily involved in the question of damages. The Ninth Circuit expressly confined its decision in *Wiener* to the facts before it, refusing to say that a separate jury can never determine the issue of damages after another jury has determined the issue of liability.

There is thus no basis for asking this Court to review the remand.

POINT II.

The admission of the depositions presents no conflict with any other circuit and no other question for review by this Court.

Petitioner has asked this Court to hear her argument that the deposition testimony of three witnesses, Cochrane, Griffiths and O'Neil, former employees of petitioner, which was read into evidence at trial, should have been excluded from evidence, because respondent supposedly failed to comply with Fed. R. Civ. P. 26(d)(3).

Petitioner is not contending here nor did she contend below that these depositions, as read at trial, were inadmissible under the rules of evidence. Petitioner is not here challenging nor did she challenge below the pretrial ruling,

reported at 23 F. R. D. 17 (S. D. N. Y. 1958), in which the District Court (Dawson, D. J.) granted respondent leave to read any of these three depositions at the trial. Petitioner merely contends that Judge Levet's finding of fact that one of the conditions of Rule 26(d)(3) had been satisfied and the Second Circuit's concurrence therein were erroneous.

In sum, petitioner asks this Court to review a finding of fact and an application of a Federal Rule by a District Judge in which the Court of Appeals has unanimously concurred. Such questions do not warrant review by this Court in the absence of a very obvious and exceptional showing of error. See *Appalachian Power Co.* v. *American Institute of Accountants*, 4 L. Ed. 2d 30, 80 S. Ct. 16, not officially reported, denying stay pending review of 268 F. 2d 844 (2nd Cir.), *cert. denied*, 361 U. S. 887 (1959); *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U. S. 271 (1949), *prior decision adhered to*, 339 U. S. 605 (1950); *Robertson & Kirkham*, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, §333 (1951) and cases cited therein.

In a vain attempt to show error, petitioner repeatedly suggests that she was deprived of her right to cross-examine these deposees because of the lower courts' rulings, an argument which conveniently ignores the fact that no attempt was made at trial to challenge the credibility of these deposees, either by rebuttal testimony or by reading the extensive cross-examination contained in each of the three depositions and conducted by petitioner's counsel in the prior action. In the words of the Second Circuit, the record contains "no suggestion that the testimony in the depositions was unreliable." (292 F. 2d at 448)

The petition also suggests that there is a conflict between *Neckwear Corp.* v. *First National City Bank*, 275 F. 2d 295 (1st Cir. 1960) on the one hand and *Frederick* v. *Yellow Cab*

Co., 200 F. 2d 483 (3rd Cir. 1952) and the decision below on the other. This is entirely erroneous.

In *Neckwear*, the First Circuit held the deposition there in question admissible even in the absence of any finding concerning the availability of the witness, because the evidence which would have shown unavailability was erroneously excluded. Contrary to petitioner's statement (p. 16), this case says nothing about any burden of proof concerning the unavailability of a deposee.

In *Yellow Cab*, a deposition was admitted even though the attorney offering it merely cited portions of the deposition where the witness stated that he was occasionally absent from the jurisdiction for business reasons, and told the Court that he had learned from someone other than the witness that the witness would not be available "today or tomorrow". The Third Circuit upheld the admission, saying:

> "Unquestionably, the showing on this issue was scant. Yet there was no showing at all in opposition. * * * On what was before him, the trial judge apparently concluded that the witness was in fact out of the jurisdiction and . . . we cannot say on this record that the trial judge was wrong in concluding that the conditions under which Rule 26(d)(3) permits the use of a deposition existed here." (200 F. 2d at 486)

In the case at bar, the Second Circuit upheld the admission of the Griffiths and O'Neil depositions, saying:

> "These [depositions] were taken in 1957 and showed on their face that the persons making them resided outside the jurisdiction. Griffiths was living in Long Beach, California; O'Neil's permanent residence was in Chicago, Illinois. When asked when he would be in New York O'Neil answered that he did not know. In colloquy, plaintiff's counsel said that he had inquired

> and had made 'every attempt possible' but had been unable to locate Griffiths and O'Neil. Parke, who was familiar with the habitués of the track, confirmed this. Therefore, Judge Levet's 'finding' that Griffiths and O'Neil were 'at a greater distance than 100 miles from the place of trial or hearings' is unassailable. There was no evidence from which this court could conclude differently." (296 F. 2d at 448)

Finally, petitioner pretends (p. 20) that she is "unable to explain why the trial court or the Court of Appeals . . . found a waiver" as to the Cochrane deposition. The record shows that the Cochrane deposition was read into evidence only after petitioner's counsel stated that "there is nothing there that I would object to" (224a). After presentation of evidence to the jury was completed (305a), and two days after the Cochrane deposition was read, petitioner's counsel moved to strike it (312a).

The Second Circuit, in affirming the denial of this motion, stated:

> "The trial court acted within its discretion in letting in the [Cochrane] deposition. It is true that Rule 46 F. R. Civ. P. has obviated the necessity of formal exceptions or rulings, but a timely objection would have given the court an opportunity to make a ruling at a time when the plaintiff could have complied without prolonging the trial. '[D]ue regard to the importance of presenting the testimony of witnesses orally in open court,' as stated in Rule 26(d)(3), did not require that Cochrane's deposition be stricken after it had been read into evidence without objection." (292 F. 2d at 448)

There is accordingly no foundation for asking this Court to review the admission of these depositions.

POINT III.

Petitioner's complaints about the Special Verdict raise no issue for review by this Court.

Petitioner also asks this Court to review her complaints concerning the form of Special Verdict submitted to the jury. The petition (p. 22) concedes that the Court of Appeals found this argument to be unworthy of comment, but asserts that the omission from Sections B and C of the Special Verdict (103a-105a) of a question based on assumption of risk was "gross error."

The law of New York, however, is clearly contrary to petitioner's assertion. Sections B and C of the Special Verdict relate to respondent's causes of action based upon negligence. Once the jury found that petitioner's negligence caused the accident and that respondent was free from contributory negligence, the doctrine of assumption of risk, as a matter of substantive law, was inapplicable, because under New York law a participant in a sport does not assume the risk of injury caused by the negligence of another. *Rosensweig* v. *State,* 208 Misc. 1065, 146 N. Y. S. 2d 589 (Ct. Cl. 1955), *rev. on other grounds,* 5 A. D. 2d 293, 171 N. Y. S. 2d 912 (3rd Dept. 1958), *aff'd,* 5 N. Y. 2d 404, 158 N. E. 2d 229 (1959); *Povanda* v. *Powers,* 152 Misc. 75, 272 N. Y. Supp. 619 (Sup. Ct. N. Y. Co. 1934).

Thus no procedural error was committed in failing to include a question inapplicable to the case under New York law. Indeed, any question as to the propriety of the form of the Special Verdict is foreclosed by the unchallenged finding of the Court of Appeals that "there was sufficient circumstantial evidence submitted to the jury to justify a plaintiff's verdict that Mrs. Graham and her employees had

been negligent and that this negligence caused the accident." (292 F. 2d at 445)

Even though the decision below contains no mention of the Special Verdict, petitioner suggests that the decision conflicts with *Cate* v. *Good Bros., Inc.*, 181 F. 2d 146 (3rd Cir.), *cert. denied*, 340 U. S. 826 (1950) and *Thedorf* v. *Lipsey*, 237 F. 2d 190 (7th Cir. 1956). Neither of these cases state that it is improper under Federal Rule 49 to submit "conclusory fact and law questions" to a jury, as petitioner claims. Each merely held that it is not error for a trial judge to refuse to instruct a jury on the legal consequences of its resolution of factual issues presented by a special verdict. No such issue is involved in this case.

There is thus no reason for this Court to review petitioner's complaints about the form of the Special Verdict.

POINT IV.

The dismissal of petitioner's counterclaim presents no conflict with any other circuit and no other question for review by this Court.

Petitioner urges this Court to hear her complaints concerning the dismissal of her counterclaim, because the dismissal was an allegedly improper "review" by Judge Levet of the decision of Judge Kaufman, and because the Second Circuit's unanimous affirmance purportedly raises a conflict with the decisions of other circuits. Petitioner's claims that there was "review" here and that it was an abuse of discretion conveniently ignore the factual situation under which Judge Levet's decision to dismiss the counterclaim occurred.

After the judgment in the prior action had become final (88a), respondent moved in this action for leave to serve

a supplemental reply asserting that petitioner's counterclaim was *res judicata* and for summary judgment dismissing the counterclaim (16a-21a). Judge Kaufman granted the motion for leave to file the supplemental reply but denied summary judgment (81a-82a). He did not decide the *res judicata* question on the merits, because he allowed the defense to be pleaded yet neither dismissed nor sustained it. Thus Judge Levet was compelled to try the *res judicata* defense in order to determine finally all the issues in the action (98a). In doing so, he was not "reviewing" a prior decision on the merits, but merely deciding an issue in the case which was properly before him for decision.

There is no foundation for the claim that the Court of Appeals' refusal to reverse Judge Levet's decision conflicts with the decisions in *United States* v. *Wheeler*, 256 F. 2d 745 (3rd Cir. 1958) and *TCF Film Corp.* v. *Gourley*, 240 F. 2d 711 (3rd Cir. 1957) and with the "principle" of *Beedy* v. *Washington Water Power Co.*, 238 F. 2d 123 (9th Cir. 1956).

In the *TCF Film* case and in the *Beedy* case, the second judge's "review" of the first judge's ruling was sustained. In the *Wheeler* case, the Third Circuit explicitly recognized that a district judge has the power to review the prior decision of another district judge. The second decision in *Wheeler* was reversed because the Third Circuit found the review to be an abuse of discretion under the circumstances of that case. There, the second judge had granted a previously denied motion to suppress evidence and to dismiss the case. An immediate appeal followed without any intervening trial. In *Wheeler*, the second decision, if improper, was prejudicial error, because it fundamentally affected the outcome of the case.

In the case at bar, there was no occasion for the Second Circuit to decide whether it was an abuse of discretion for

Judge Levet to "review" the decision of Judge Kaufman, because there was no review. Judge Levet did not entertain a second motion for summary judgment. He decided a triable issue left open for him to resolve in a case assigned to him for trial of all issues. Thus the sole question before the Court of Appeals was whether Judge Levet's decision *was correct. Since the Court of Appeals unanimously* decided that it was correct, no penchant for consistency could sensibly require reversal merely because another district judge might disagree with it.

And unlike the situation in *Wheeler*, between the dismissal of the counterclaim by Judge Levet and its review by the Court of Appeals, there was an intervening jury verdict explicitly finding that the negligence of petitioner caused the collision which was the subject matter of her counterclaim. As the Second Circuit stated:

> "Furthermore, the jury in the present case, in answer to a special interrogatory propounded by the court, found that defendant, Mrs. Graham, had been negligent, which was proof enough that it would have found in favor of the plaintiff on the defendant's counterclaim had that issue been submitted to it." (292 F. 2d at 447)

At the point this case reached the Court of Appeals, therefore, the counterclaim was conclusively barred under New York law by the decision of the jury in this very case that Mrs. Graham had not been free from negligence. *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116, 134 N. E. 2d 97 (1956); *Good Health Dairy Prods. Corp.* v. *Emery*, 275 N. Y. 14, 9 N. E. 2d 758 (1937); see also *Hinchey* v. *Sellers*, 7 N. Y. 2d 287, 165 N. E. 2d 156 (1959). Thus, even if Judge Levet's

decision had been incorrect, it would have been harmless error because of the intervening jury verdict in this case.

There is thus no basis for asking this Court to review the dismissal of the counterclaim.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 1, 1961

APPENDIX.

28 U. S. C. §2101(e).

An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

Judgment Below.

UNITED STATES COURT OF APPEALS,

FOR THE

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of July, one thousand nine hundred and sixty-one.

Present:

Hon. CHARLES E. CLARK,
Hon. CALVERT MAGRUDER,
Hon. LEONARD P. MOORE,
Circuit Judges.

FANNIE K. HERTZ,
Plaintiff-Appellee,

v.

ELIZABETH N. GRAHAM, individually and doing business as MAINE CHANCE FARM,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that that part of the judgment of said District Court so far as it is based upon the earlier verdict of the jury as to the amount of the plaintiff's loss be and it hereby is affirmed.

Further ordered, adjudged and decreed that that part of said judgment which allows interest be and it hereby is vacated and that the action be and it hereby is remanded in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

Respondent's Appendix in the Court of Appeals.

NOTICE.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

FANNIE K. HERTZ,
Plaintiff,
against
ELIZABETH N. GRAHAM, individually and doing business as MAINE CHANCE FARM,
Defendant.

Civil Action No. 39.

SIRS:

PLEASE TAKE NOTICE, that upon the assignment of this action to a District Judge for trial, the undersigned will make application to such Judge for a separate hearing and determination of the issues raised by plaintiff's Supplemental Reply, filed herein on April 23, 1959, by such Judge without a jury, prior to the submission of other issues in this action to trial by the court and jury.

Dated: New York, New York,
March 25, 1960.

Yours, etc.,

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